

STATE OF MICHIGAN  
IN THE SUPREME COURT

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MAKENZIE GREER, Minor,  
KENNETH GREER, Individually and  
as Conservator for MAKENZIE  
GREER, and ELIZABETH GREER,

SUPREME CT DOCKET NO:  
149494

Plaintiffs/Appellees/  
Cross-Appellants,

CT OF APPS DOCKET NO:  
312655

vs

ADVANTAGE HEALTH and  
ANITA R. AVERY, MD,

KENT CO CIR CT FILE NO:  
10-09033-NH

Defendants/Appellants/  
Cross-Appellees,

**APPLICATION FOR LEAVE  
TO APPEAL AS CROSS-  
APPELLANTS**

and

TRINITY HEALTH-MICHIGAN,  
d/b/a ST. MARY'S HOSPITAL, and  
KRISTINA MIXER, MD,

Defendants.

149494(50) / OK

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**FILED**

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\_\_\_\_\_  
WILLIAM J. WADDELL (P21879)  
JONATHAN S. DAMON (P23038)

STEVEN C. BERRY (26398)

**NOW COME** Makenzie Greer, minor, Kenneth Greer, Individually and as Conservator for Makenzie Greer, and Elizabeth Greer, by JONATHAN SHOVE DAMON, Attorney and Counselor, and pursuant to MCR 7.302(D)(2) apply for leave to appeal as cross-appellants from the published Court of Appeals decision [Docket No., 312655] of May 13, 2014.

DATE: July 7, 2014

JONATHAN SHOVE DAMON  
Attorney and Counselor

By \_\_\_\_\_

Jonathan S. Damon

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**STATEMENT OF QUESTION PRESENTED**

**DID THE TRIAL COURT ERR IN RULING THAT SETTLEMENT PROCEEDS RECEIVED FOR THEIR INDIVIDUAL AND INDEPENDENT DAMAGE CLAIMS BY KENNETH GREER AND ELIZABETH GREER SHOULD NOT BE SET OFF FROM THE DAMAGES AWARDED TO MAKENZIE GREER?**

Plaintiffs/Appellees/Cross-Appellants Greer say no.

Defendants/Appellants/Cross-Appellees Advantage Health and Dr. Avery say yes.

Trial court said no.

Court of Appeals said yes.

### **STATEMENT OF JURISDICTION**

The decision of the Court of Appeals from which Advantage Health and Dr. Anita R. Avery, MD seek leave to appeal was released on May 13, 2014. The application for leave to appeal filed by Advantage Health and Dr. Avery was timely filed within 42 days thereof, on June 17, 2014. The present application for leave to appeal as cross-appellants filed on behalf of the Greers is timely, having been filed within 28 days thereof. MCR 7.302(D)(2).

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WILLIAM J. WADDELL (P21879)  
JONATHAN S. DAMON (P23038)

STEVEN C. BERRY (26398)

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**STATEMENT OF FACTS AND PROCEEDINGS**

On September 7, 2010 plaintiffs Kenneth Greer, Individually and as Conservator for Makenzie Greer, a minor, and Elizabeth Greer individually filed the present complaint. [Docket entry 222]. The complaint was filed against four health care providers: Advantage Health; Dr. Anita R. Avery, MD; Trinity Health-Michigan, d/b/a St. Mary's Hospital; and Dr. Kristina Mixer, MD. Liability was to be imposed jointly and severally, and arose out of the devastating,



negligently performed delivery of Mr. and Mrs. Greer's daughter Makenzie on September 28, 2008. [Complaint, ¶¶ 4, 19, 24, 39]. Mr. Greer, acting as Conservator for his daughter, sought damages for the injuries sustained by Makenzie, which included hypoxic brain injury, respiratory depression, metabolic acidosis, permanent and irreversible brain damage, and blindness. [Complaint, ¶¶ 24, 39].

Mr. Greer, Individually and as Conservator for Makenzie, made claim for medical expenses incurred for treatment of Makenzie. [Complaint, ¶ 41]. Mrs. Greer made claim for personal injuries she herself sustained as a result of the botched delivery, including a uterine rupture, urethral injury, disfigurement and scarring. [Complaint, ¶¶ 24, 43]. And Mr. Greer sought damages for loss of consortium for the injuries sustained by his wife. [Complaint, ¶ 42]. Discovery, as well as the normal procedures attendant in a complicated medical malpractice case ensued. Eventually the Greers and St. Mary's Hospital entered into a confidential settlement. That settlement was for \$600,000.00 for all claims brought by the Greers. [Opinion and Order of August 8, 2012, p 5 - docket entry 23; June 7, 2012 motion hearing, pp 9, 11 – docket entry 27]. (Dr. Mixer had been dismissed, without prejudice, in an earlier Stipulation and Order of Dismissal. [Docket entry 189].)

Once St. Mary's had completed its settlement and been dismissed pursuant to the order approving the settlement and dismissing the action as to it [docket entries 69, 70], the case continued against Advantage Health and Dr. Avery. Trial began before Kent County Circuit Court Judge the Hon James Robert Redford on April 17, 2012 and continued until the jury returned its verdict on April 27, 2012. [Trial Trs I – IX]. The jury found no cause for action as to the individual claims of Mr. and Mrs. Greer [4/27/12 Trial Tr, pp 5-6] but found in favor of Makenzie and awarded substantial damages. [4/27/12 Trial Tr, pp 4-7; Special Verdict for Makenzie Greer - docket entry 37].

Various post-trial motions were then filed by both parties, two of which are pertinent to the application for leave to appeal filed by Advantage Health and Dr. Avery and the application for leave to appeal as cross-appellants filed by the Greers. [Docket entries 34, 33, 31]. On August 8, 2012, Judge Redford issued a seven page Opinion and Order regarding those motions, concluding that judgment would enter against Dr. Avery and Advantage Health in the sum of \$1,058,825.56 plus taxable costs. [8/8/12 Opinion and Order, p 7 – docket entry 23]. On August 28, 2012, Dr. Avery and Advantage Health filed a motion for reconsideration [docket entry 15], which was denied in an Opinion and Order of September 12, 2012. [Docket entry 8]. Accordingly on September 14, 2012, the court entered its Order For Judgment in favor of Kenneth Greer, Conservator for Makenzie Greer against defendants Anita R. Avery, MD and Advantage Health, jointly and severally, in the sum of \$1,058,825.56 plus taxed costs [docket entry 4], and entered an order taxing costs against Advantage Health and Dr. Avery in the sum of \$32,393.80. [Docket entry 6]. Advantage Health and Dr. Avery timely filed an appeal of right with the Court of Appeals.

In a published opinion of May 13, 2014 [Docket No. 312655], the Court of Appeals affirmed in part and reversed in part. The court affirmed Judge Redford's ruling that damages for medical expenses awarded Makenzie were not to be reduced, in whole or in part, by payments made by health insurers due to liens which they asserted, holding that those payments were not "collateral sources" under MCL 600.6303. That ruling, and the Court of Appeals' affirmance thereof, is the subject of the application for leave to appeal to this court filed on behalf of Advantage Health and Dr. Avery. The Greers' response to that application will be submitted in a separate brief.

The Court of Appeals then ruled that the full \$600,000.00 settlement received by all three Greers, to compensate them for their individual claims, was to be set off only against Makenzie's

recovery, not just the amount of the settlement apportioned to Makenzie. It is from that ruling that the Greers ask this court to grant them leave to appeal as cross-appellants.

### **ISSUES AND DISCUSSION**

#### **DID THE TRIAL COURT ERR IN RULING THAT SETTLEMENT PROCEEDS RECEIVED FOR THEIR INDIVIDUAL AND INDEPENDENT DAMAGE CLAIMS BY KENNETH GREER AND ELIZABETH GREER SHOULD NOT BE SET OFF FROM THE DAMAGES AWARDED TO MAKENZIE GREER?**

The ruling of the majority in the Court of Appeals' decision (there was a concurrence, which disagreed with the panel's legal reasoning but nevertheless concurred in its ultimate ruling) appears to be unique to the jurisprudence of this state, for it requires that a jury's award for one person's injury must be reduced by settlements received by others for entirely separate and distinct legal claims. In so ruling the panel relied exclusively upon this court's decision in *Velez v Tuma*, 492 Mich 1, 821 NW 432 (2012). In so doing, however, the Court of Appeals failed to recognize one crucial distinction between the cases – in *Velez*, there was but one injured person, one plaintiff, who recovered one settlement, for one injury. In the present action, the settlement with St. Mary's Hospital extinguished three separate, distinct and independent claims by three individuals. For as noted, there was a claim on behalf of Makenzie for the devastating injuries she received during the delivery. There was a separate and distinct claim brought on behalf of her mother for the disfiguring injuries she sustained. And Makenzie's father, husband of Elizabeth, had a viable and independent claim for economic damages (medical bills) and for loss of consortium. That consortium claim could not have been for the injuries sustained by Makenzie, but only for those sustained by his wife. *Sizemore v Smock*, 430 Mich 283; 422 NW 666 (1988); *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29; 427 NW2d 488 (1988). Mr. Greer's

claim for medical expenses incurred on behalf of his daughter, likewise, is a separate and independent cause of action. Gumienny v Hess, 285 Mich 411; 280 NW 409 (1938). Despite recognizing the existence of the three claims, the Court of Appeals nevertheless found Velez to require a set-off of the amounts received in settlement for all three claims solely against the damages awarded Makenzie. How did the Court of Appeals do this?

First, the court erred, at page 5 of its decision, in finding that all of the damages arose out of a single incident, the birth of Makenzie, and therefore there was but a single injury for which plaintiffs could have but one recovery. This, of course, ignored the existence of the independent causes of action, and in fact, separate and distinct injuries suffered by the Greers. There was not just one injury – there were three.

It appears that the Court of Appeals equated the cause of the injuries to the number of injuries. There may have been but one “incident” giving rise to all three injuries, the botched delivery of Makenzie, but that does not mean that there were not multiple injuries. Were the Court of Appeals’ rationale to be accepted, a single incident, such as a motor vehicle accident causing multiple injuries, would allow for a set-off of any settlement made by one passenger against awards received by other passengers. Had Makenzie and her mother received their injuries in a motor vehicle accident, perhaps caused by the negligence of drivers for St. Mary’s Hospital and Dr. Avery, would a settlement reached with the three Greers on behalf of St. Mary’s be considered a set-off against Makenzie’s recovery against Dr. Avery? To ask the question is certainly to answer it. Yet there is no distinction between that situation and one in which the Greers’ injuries were caused by the professional negligence of Dr. Avery and the claimed negligence (prior to the settlement) of St. Mary’s Hospital. The error of the Court of Appeals is obvious – it inappropriately applied Velez, a case involving a single plaintiff, to the present case, involving three plaintiffs with individual and independent causes of action. It

applied the set-off rule to all injuries sustained as a result of a single incident, failing to recognize that a single incident can give rise to multiple causes of action.

Strangely, the Court of Appeals looked to the jury's verdict to support its decision, yet that is the epitome of *ex post facto* reasoning. The claims brought against St. Mary's differed from those brought against Dr. Avery, and St. Mary's obviously felt that the claims had sufficient merit to support a \$600,000.00 settlement. The jury may have found that the individual claims of Mr. and Mrs. Greer had no merit, but only as to their claims against Advantage Health and Dr. Avery. It made no determination, nor could it, of the validity of their claims against St. Mary's. The jury's verdict, therefore, offers no support whatsoever for the reasoning behind the panel's decision. Indeed, Judge Redford noted the difference between the claims asserted against Dr. Avery and those asserted against the hospital when he stated, in his Opinion and Order Denying Motion for Reconsideration of 9/12/12, p 4 [Docket entry 8]:

"The settlement of the claims was as to all three plaintiffs. The Court notes while the mother and father received a 'no-cause' on their claims against the Plaintiff Doctor, in the Court's opinion, it is more likely than not that such would not have been the case in the parents' claim against the hospital. Multiple times during the trial, the parents provided specific and detailed testimony of how they had advised agents of the hospital that the delivery was in *extremis* and it was suggested the hospital and its agents did not act properly."

Finally, it appeared to be of concern to the Court of Appeals' panel, including the concurrence, that the specific apportionment of the \$600,000.00 settlement was not to be found in the record. This, however, is easily explained. The settlement with St. Mary's was confidential. See release, paragraphs 5 and 5(a). There was, however, an apportionment to the various claims upon the settlement, including those of Mr. Greer individually and his wife Elizabeth, that apportionment being found in confidential Exhibit A. See specifically Judge

Redford's Order For Approval of Partial Settlement and Distribution of Proceeds, entered March 27, 2012. [Docket entry 70]:

"The plaintiffs', Kenneth Greer, individually and as Conservator for Makenzie Greer, and Elizabeth Greer, shall receive their share of settlement as outlined in the confidential Exhibit A." [Order for approval of March 27, p 2].

Strangely, despite knowing, or certainly having reason to know (the order being of record) of the existence of the apportionment set out in confidential Exhibit A, counsel for Advantage Health and Dr. Avery apparently never sought to review it. Had he, it is highly unlikely he would even have raised this issue. Certainly the confidentiality provision could have been avoided by entry of a protective order limiting the identities of those entitled to review Exhibit A, but it does not appear that any such request was ever made by Advantage Health/Dr. Avery. And as noted by Judge Redford in both his Opinion and Order of August 8, 2012, ruling on the various post-trial motions as well as in his Opinion and Order Denying Motion for Reconsideration of September 12, 2012, the verdict in favor of Makenzie was indeed reduced by \$200,000.00 minus a portion of the medical liens, for a total reduction of \$162,058.11.

The settlements received by Mr. Greer and Mrs. Greer, adults, did not require court approval. The settlement for Makenzie, however, did require approval from the Circuit Court. MCR 2.420. Judge Redford, in recognizing the apportionment of the \$600,000.00, clearly intended to resolve all three individual claims brought against St. Mary's and did as he was supposed to do in approving Makenzie's share.

The fallacy of the Court of Appeals' reasoning can be exhibited easily under several scenarios. First, how would the set-off (already apportioned as set out in Exhibit A) have been applied had Mr. and/or Mrs. Greer received a damage award from the jury? Would the full settlement amount have been subtracted from each award? Under the rationale of the Court of

Appeals it appears it would, for there still would have been but one “incident” giving rise to the three claims.

Another question arises – if the \$600,000.00 settlement with St. Mary’s is to be considered a set-off only against Makenzie’s recovery, does that mean that the full \$600,000.00 belongs exclusively to her, with nothing to be awarded to her father or mother? That certainly would follow from the rationale of the Court of Appeals, yet it is not only contrary to common sense, but even more important contrary to the intention of the parties to the settlement.

The decision of the Court of Appeals, a published decision, must be overturned. It is unique, the only known occasion that one individual’s independent recovery was set-off against another person’s recovery for a different cause of action. Its rationale, looking at the single event causing the claims rather than the nature of the claims themselves, is without support in statute or case law. *Velez, supra*, upon which the Court of Appeals relied, is, as noted above, entirely inapposite to this case, which involves independent causes of action by multiple individuals. And finally, and perhaps most importantly, the decision of the Court of Appeals creates a gross miscarriage of justice, drastically reducing the jury’s determination of Makenzie’s damages by amounts she was never intended, by her parents or by St. Mary’s Hospital, to receive. Judge Redford perhaps stated it best when he ruled, in his Opinion and Order of August 8, 2012:

“In the instant case, like in Markley, joint and several liability applies. Plaintiffs Makenzie Greer and her parents Mr. and Mrs. Greer, together accepted a settlement payment in the amount of \$600,000 in exchange for a full release of their claims against Defendant St. Mary’s Hospital. Defendants Advantage Health and Dr. Avery chose not to settle their liability and proceeded to trial where the jury found Defendants at fault for the injuries to Makenzie Greer only. Wherefore, without application of the set-off rule the Court is satisfied that Plaintiff Makenzie Greer would be permitted to recover twice for her injury and that some set-off is required as to the injury suffered by Makenzie Greer.

The jury, however also found no cause of action as to the claims of Plaintiffs Mr. and Mrs. Greer. Taking into account, that the settlement agreement with St. Mary's Hospital applied to not only Makenzie Greer's claims but also to those of her parents Mr. and Mrs. Greer individually, the Court is mindful that to allow a set-off for the full settlement amount would be manifestly unjust as it would diminish the damages the jury awarded to Makenzie Greer to set-off against the portions of the settlement which were paid in consideration of Mr. and Mrs. Greer's individual claims. Being separate causes, the amount of the settlement made between Mr. and Mrs. Greer and the St. Mary's defendants is separate from and distinct from any amount that might be determined to be allowed for a set-off against the jury verdict on Makenzie's damages. In order to prevent this manifest injustice, the Court finds it appropriate to allow a set-off in the amount of \$162,058.11 or 1/3 of the settlement amount with St. Marys which represents that portion of the settlement paid in exchange for release of liability for Makenzie's injuries."

#### **RELIEF REQUESTED**

For the reasons expressed above, plaintiffs/appellees/cross-appellants Greer ask this court to grant them leave to appeal as cross-appellants and ultimately, to reverse the decision of the Court of Appeals allowing the full \$600,000.00 settlement to be set off solely against the recovery by Makenzie Greer. Should the court believe that more details on the apportionment of the settlement, or the contents of Exhibit A, are important, then it is requested that the case be remanded to Judge Redford for clarification, with a protective order regarding confidentiality if necessary.

DATE: July 7, 2014

JONATHAN SHOVE DAMON  
Attorney and Counselor

By

  
Jonathan S. Damon